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Luther and the Law

By KARL H. HERTZ*

DOU SEE, THEN, how much good a pious jurist or legal scholar can produce. Indeed, who can recount it all? For any ordinance and work of God constantly produces so much great fruit that it cannot be counted or comprehended. For one thing, the jurist with his law book (by God's ordinance) maintains and helps to further the whole worldly government—emperor, princes, lords, cities, land, and people, as was said above; for all these must be preserved by wisdom and law. But who is able adequately to praise this work alone? By it you receive protection of life and limb against neighbors, enemies, and murderers. Then, too, you have peace and tranquility for your wife, daughter, son, house and home, servants, money, property, lands, and everything that you have. For all of this is comprehended in, encompassed by, and hedged about with law. What a great thing this is can never be fully told in any book; for who can adequately describe what an unspeakable blessing peace is, and how much it both gives and saves even in a single year?

... I would take the work of a faithful, pious jurist and clerk over the holiness of all the priests, monks, and nuns, even the very best.¹

Luther had a bad reputation among the lawyers. Without question, this reputation had a factual basis. In his vehement attacks on works-righteousness and frequent expressions of contempt for the canon law (including the famous bonfire at which his students enthusiastically tossed their law books into the flames), Luther was an arbitrary spirit, who, although deeply religious, made exaggerated claims of spiritual freedom and supine admonitions to political subservience.

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1. *A Sermon on Keeping Children in School, 1530*, in 46 LUTHER'S WORKS 240-41 (R. Schultz ed. 1967).

Luther was, however, a sufficiently complex figure and his times were so greatly confused that it is not surprising that he gave seemingly contradictory admonitions. He saw the preaching office as a public office, and he felt that his own calling as the advocate of the recovered Gospel obligated him to speak out on the questions that emerged from the social and religious turmoil of sixteenth century Germany.

Thus, in 1530, Luther stated in a commentary on Psalm 82:

If you are in the ministry and are not willing to rebuke your gods (princes) openly and publicly, as your office demands—at least leave off your private backbiting, calling of names, criticizing, and complaining, or go hang! . . . To rebuke rulers in this way is . . . a praiseworthy, noble, and rare virtue, and a particularly great service to God.²

Luther was no more a legal philosopher than a systematic theologian. Rather, he spoke out of the circumstances in which he found himself, but with a surprising faithfulness to his own vision of the Gospel and at times, with startling departures from the conventional wisdom of his teachers and contemporaries. He was a monk and a professor of *Bible* whose zeal for his discoveries and the gifts that had been bestowed upon him drove him to public confrontation. He first confronted abuses in the practices of the church and then espoused a radically different perspective of both the eternal welfare of humankind and its civil organization.

Luther began his educational career as a law student. The significance of these legal studies in his thinking was at least twofold. He must have obtained some preliminary grasp of legal learning, and his study undoubtedly exposed him to the Roman law, which was then gradually replacing the old Germanic customary law as the authoritative law in the various states and principalities. As this Article will point out, he remained a strong advocate of the Roman law throughout his life.

Luther also had considerable need of legal counsel throughout his career. He was an outlaw of the Empire from 1521; so he often had need to consult with his legal colleagues. Among those for whom he had a great admiration and who accompanied him to the Diet of Worms was Hieronymus Schurpf, a professor of law at Wittenberg,

2. 13 LUTHER'S WORKS 50 (J. Pelikan ed. 1956).

whom both Luther and his colleague Melanchthon held in highest regard. Schurpf supported the Reformation, but he did not join Luther in rejecting canon law. Schurpf strongly influenced the legal thinking of Melanchthon, and the latter may have provided a link between the legal thinking of the middle ages and the natural law philosophies of the seventeenth century.³

The Fehderecht

A full appreciation of Luther's role in the development of attitudes towards law and legal institutions requires consideration of the customs of his time. In Luther's writings on the Peasants' Revolt one note repeats itself almost ad nauseum. It was Luther's insistence that individuals were not to act as judges in their own cases. Persons do not have the right to take the law into their own hands and right a wrong by their own initiative. To many ears this advice, given in the midst of civil strife, must have seemed rather out of place. One could hardly stop revolutionaries with moral admonitions.

In fact, much more was involved. Luther gave this particular piece of advice not only to the peasants, he gave it time after time to a variety of constituencies during the course of his life. It was a central legal principle for him. It was the basic premise of his understanding of the law.

Luther's advice also constituted a revolutionary breakthrough in the understanding of law in the fragmented German territories of the Holy Roman Empire. Only recently, partly because of Gerta Scharffenorth's pioneering work on Luther in her Heidelberg dissertation,⁴ are people becoming aware of the nature of Luther's contribution to the understanding of the law. Under Germanic custom every individual could rely on the *Fehderecht*, the right of feuding, to justify personal initiative in redressing any wrong another had done to that individual. Each person was, in fact, not only free but obligated to act when another injured that person's honor. Furthermore, the responsibility fell upon the kin group, not just upon the individual.

3. G. KISCH, *MELANCHTHONS RECHTS — UND SOZIALLEHRE* 125 (1967).

4. Scharffenorth, *Romer 13 in der Geschichte des Politischen Denkens* (1964) (Heidelberg, Ph.D. dissertation) [hereinafter cited as Scharffenorth].

Emperors had struggled constantly against this anarchic principle. The church also had made efforts to establish civil peace. Finally, in 1495 at Worms, the various estates and principalities hammered out an agreement to give a new imperial court limited jurisdiction in the resolution of these continuing conflicts.

The agreement of 1495 was part of the process by which the written Roman law began to win dominance in the German territories. This dominance came not without resistance, however. The Peasants' Revolt had as one of its rallying cries the restoration of the rights that had been customary before the coming of the Roman law.

Luther's was a strong voice against the *Fehderecht* and in favor of Roman law. He was an apostle of political change and legal innovation. He looked for a new, objective basis for law.

In the judgment of Vinogradoff, Germany at the end of the fifteenth century was basically anarchic before the introduction of Roman law.⁵ This opinion reflected the bias of Vinogradoff, who saw the penetration of Roman law into the territory beyond the Rhine, where Roman arms had never sustained dominion, as a sign of progress. It would probably be more objective to describe the situation not as anarchic, but as one characterized by a very widespread conflict of laws. Fifteenth and sixteenth century defenders of the old customs did not see themselves as lawless; indeed in their own terms they were upholding the objective order of their communities.

Feudal Germany

One cannot understand what transpired in Germany without an overview of the larger picture in which German events formed a paradox. The Europe of the sixteenth century was a creation of the middle ages, and in Germany the feudalism of medieval Europe persisted longer than elsewhere.

The beginnings of feudalism are still obscure. Historians do know that by the ninth century customary law dominated in Germany and France.⁶ Enacted legislation, even as restatement of old laws, had disappeared. Europe had lost the knowledge of the old law-books. No legal profession existed: "[T]he procedure did not call

5. P. VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE* 119-27 (3d ed. 1961).

6. See M. BLOCH, *FEUDAL SOCIETY* 109-10 (L. Manyon trans. 1961).

for advocates, and every chief was a judge. This means that in practice that [sic] the majority of the judges were unable to read—a state of affairs unfavourable to the maintenance of the written law.”⁷ Thus, everywhere custom determined law. Custom became the sole living source of the law, and legislation “scarcely claimed to do more than interpret it.”⁸

Furthermore, custom decreed that in matters of personal injury, private vengeance was the appropriate form of justice. The onus lay on the injured individual; vengeance was one of the most sacred duties which bound the individual. Vengeance bound not only the individual, it also bound the kin group. To avenge a kinsman was obligatory: “[n]o moral obligation seemed more sacred than this.”⁹

It is extremely difficult in present times to perceive such a society as having any principle of order. One must remember, however, that this period was one in the history of Europe when newly emerging peoples, from the Danubian plains to the east and from the north as well, swept over what had been for generations centers of Roman civilization. Means of communication had broken down; life was unsafe. Only personal bonds of protection and dependency offered hope for the weak. Those who rose to positions of power under these conditions had no alternative except to make their strength in battle and their superiority in leadership into virtues. The nobility of the feudal period, if the term is appropriate, was a warrior class. Fighting was their profession, their basis of security, and their crucible of virtue.

Efforts were made from time to time to establish peace, to restore unity, and to centralize power. Charlemagne, for example, stands out among those who succeeded for a time. The empire which came into being, the Holy Roman Empire of the German People, always promised more than it could perform. It was an empire within which, especially in its German territories, there existed a bewildering variety of little principalities, ecclesiastical territories, and, eventually, independent cities. Thus, within the Empire there was a kind of dualism of legal systems—imperial administration and various local jurisdictions.

7. *Id.* at 110.

8. *Id.* at 111.

9. *Id.* at 126.

Moreover, advocates of imperial order constantly conflicted with the claims of the church, thereby making attempts at order even more difficult. The Middle Ages, notwithstanding the abuses of the clergy, were still overwhelmingly times of faith. The authority which the church claimed, the use of that authority in the continuing elaboration of arguments legitimating the deposition of tyrants on religious grounds, and the strengthening of the authority of the papal see, must have continually haunted rulers who found papal objectives and their own interests running at cross-purposes. Although the church no longer possessed the kind of recognition that it once had, the great edifices of scholastic theology and canon law constituted strong fortifications for the strong hand of spiritual princes. Either a stronger papacy or a stronger Empire might have brought more orderly development. The fifteenth century lacked either most of the time.

In the same century, in France and in England, nascent nationalism had already begun building unified political societies that were strong enough in certain respects to resist papal claims. The fragmented situation of Germany, the strong piety which prevailed in many parts of the country, and the disinclination of powerful princes to enter into larger alliances in which any one of their voices might be of lesser importance, however, kept German developments lagging behind its neighbors to the west. In addition, the eastern parts of Germany, especially the great flatlands stretching toward the Baltic and Russia, were still areas of colonial settlement. In the east, therefore, the institutions of law and order and of learning and religion were still establishing themselves.

Law in these Germanic territories was not Roman law, but "the good old law, unenacted and unwritten, residing in the common sense of justice, the sum total of the subjective rights of individuals."¹⁰ The Germanic peoples took the right of self-help for granted. The *Fehderecht*, the blood-feud, was a combination of right and force so that "even the king was not exempt, for if the king broke the law (violated the subject's right), the subject was free to take law into his own hand."¹¹ Community opinion gave the sanction of legitimacy to such individual self-help; that action itself most frequently took form as the violent recovery of one's due.

10. See generally F. KERN, *KINGSHIP AND LAW IN THE MIDDLE AGES* (1968).

11. *Id.* at 89.

Both the church, by prohibiting the *Fehderecht* in certain times and places, and the Empire, by establishing courts of higher jurisdiction, made repeated attempts to overcome customary institutions such as the right to self-help. The empire, however, did not possess the military power, assuming any emperor ever had the single-minded commitment to establish public order, to bring about the necessary changes. Nor was the church, whose best leaders and thinkers were committed to public peace, able to pursue peace, except under the aegis of ecclesiastical sovereignty. The secular lords were less and less willing to submit to such sovereignty, no matter how devout they may have been. That is, the continuing conflict between the "two swords" (to use the medieval terminology) contributed to the disorder of fifteenth and sixteenth century Europe. No one had found the rationale upon which to establish secular power independent from ecclesiastical power.

The Natural Law

It was that rationale which Luther was to contribute.

Before considering Luther's specific contributions, an examination of the development of theories of natural law will serve as needed background. The recovery of parts of the Aristotelian corpus gave a major impetus to the intellectual life of the Middle Ages. It also made possible the synthesis of revealed knowledge and secular philosophy found in scholastic theology. Those portions of the Aristotelian corpus provided human reason with materials upon which to work and develop, and the rising universities gave it a congenial supportive environment.

For scholastic philosophers to concern themselves with questions of law was only natural, for certainly the turbulent world in which they worked needed a principle of order. Both Scripture and philosophical tradition made their contributions. In Thomism, for example, clear linkages run from the eternal law of God through natural law to positive law. Paul's letter to the Romans, insisting that the law is written in all human hearts, provided a basis by which theologians could go beyond the Decalogue (Ten Commandments) to describe divine requirements and simultaneously link these requirements with human nature itself. At the same time, the Decalogue provided content for the natural law. What God required seemed,

in an age as devout as the Middle Ages, to coincide rather fully with what reason also prescribed.

Once one acquired the knowledge of the natural law, to which both reason and revelation contributed, one could formulate fundamental principles by which to judge the actions of governments. The Middle Ages did not, of course, know sovereignty in the same sense as the present. Instead, a bewildering array of persons through relationships of fealty and overlordships exercised jurisdiction over feudal retainers, territory, or ecclesiastical benefices.

From the point of view of the church all magistracies possessed some kind of guardianship over the welfare of the people. At the same time no magistrate stood over the law. The law itself was supreme and the divine lawgiver was the sole authority who stood above the law. The scope and application of the law, however, became more clearly defined with the increasing sophistication of the scholastics' and canonists' legal reasoning.

The famous thirteenth chapter of Paul's letter to the Romans best expounded the duties of the magistrates.¹² The first verse of *Romans* 13 sets forth one of the points in contention between defenders of ecclesiastical prerogative in the Middle Ages and their opponents. Defenders of prerogative had long interpreted the apostolic insistence that "the powers that be are ordained of God"¹³ to mean that the spiritual sword was superior to the temporal sword. Thus, authority to rule in a secular realm required confirmation from the Vicar of Christ, the Bishop of Rome. The anointing of kings in the coronation ceremony represented the ritual enactment of this claim.

The ecclesiastics also claimed that the authority to confer power implied the authority to withdraw it. More significantly, this claim of divine oversight over the secular magistrates through the spiritual princes provided the basis for the development of theories for the resistance of tyranny.

Thus, in a variety of ways, the corpus of natural law theory in connection with the interpretation of *Romans* 13 provided a fairly complete political theology for the Middle Ages.

12. Cf. Scharffenorth, *supra* note 4.

13. *Romans* 13:1.

Secular and Ecclesiastical Independence

In addressing the specific ways in which Luther reacted to the political questions of the early sixteenth century, it will be helpful to focus on two further questions, in addition to the one we have just discussed, namely, the *Fehderecht*, the right of private vengeance. There is, in addition, the question of which law applied—the Germanic customary law, the Roman law, or, as the enthusiasts to the left of Luther suggested, the Mosaic law¹⁴—and the relationship of this law to natural law. Finally we must examine the role of government, its proper functions, and the right to resist when it failed in its functions or transgressed its proper bounds. These questions are all weighty issues, and to each of them Luther gave an answer which was innovative, although he thought he was only restating previous teachings of the Scriptures and the church fathers. Like most of his contemporaries, Luther saw innovation as a departure from the good.

A brief chronological overview may be helpful. In 1520 in his "Address to the German Nobility," Luther challenged the conventional interpretation of *Romans* 13 and insisted that members of the spiritual estate, including the Bishop of Rome, were subject to secular government, not independent from or superior to it.¹⁵ Luther had broken with the medieval doctrine of good works and, on the basis of his new religious vision, had developed a basic social ethic in the treatise, "The Freedom of a Christian," his seminal work in Christian ethics. In 1520 he also wrote "Treatise on Good Works." Some time in 1521 he published a commentary on "The Magnificat" and about ten years later, after intermittent work on the texts, his sermons on The Sermon on the Mount.

In these writings, Luther began to develop a basically new understanding of the concept of natural law. His successors, beginning with Melanchthon and continuing through the age of orthodoxy,

14. See text accompanying notes 4 & 5 *supra*.

15. In the treatise, "Temporal Authority; To What Extent It Should Be Obeyed, 1523," he continued his challenge and made a full-fledged argument for the institutional independence of civil government from religious control. This argument was an early, incomplete, exposition of his famous doctrine of two kingdoms and two forms of governance. Most scholars know this doctrine only under the misleading title of "the doctrine of the two kingdoms" and thus fail to see the complex distinctions Luther made. See K. HERTZ, *Two Kingdoms and One World* (1975).

failed to understand his new initiatives. Luther had already spoken of the right of resistance in his treatise on "Temporal Authority" when the issue came to a head in the revolt of the Swabian peasants. He met head on the old Germanic tradition of self-help, the right to take the law into one's hands, and challenged its correctness. He declared,

Here is God's word, spoken through the mouth of Christ, "All who take the sword will perish by the sword" [Matt. 26:52]. That means nothing else than that no one, by his own violence, shall arrogate authority to himself

. . . .

. . . Then, too, there is the natural law of all the world, which says that no one may sit as judge in his own case or take his own revenge.¹⁶

In this conflict, Luther took his stand with the Roman law. He did not deny the validity of many of the grievances that the peasants presented. His first words were addressed directly to the secular princes:

We have no one on earth to thank for this disastrous rebellion, except you princes and lords, and especially you blind bishops and mad priests and monks, whose hearts are hardened, even to the present day [A]s temporal rulers you do nothing but cheat and rob the people so that you may lead a life of luxury and extravagance. The poor common people cannot bear it any longer.¹⁷

Luther, however, could not accept the religious claims of the peasants that their cause was that of the Gospel. Nor could he accept the legitimacy of their appeal to arms. He answered their claims by stating that "the gospel . . . does not become involved in the affairs of this world, but speaks of our life in the world in terms of suffering, injustice, the cross, patience, and contempt for this life and temporal wealth. How, then, does the gospel agree with you?"¹⁸ Luther's deep concern for public order leads to some of the exaggerated violence of his second letter. Even then, however, he counseled against violence against the uninvolved and the innocent.

16. *Admonition to Peace, A Reply to the Twelve Articles of the Peasants in Swabia*, 1525, in 46 LUTHER'S WORKS 24-25 (R. Schultz ed. 1967).

17. *Id.* at 19.

18. *Id.* at 35-36.

The questions that the Peasants' Revolt raised became sharper for Luther, however, as the violent suppression of Protestantism became an issue. He finally and resignedly faced the complex and dual nature of the empire and recognized that nonresistance was not the only choice. The princes and other subordinate rulers within the empire had public responsibilities separate from those of the emperor so that they could resist within certain limitations.

Luther's contributions to social and political questions were much more extensive than this brief chronology would indicate. He also addressed the question of a Christian's participation in war, partly in response to the extreme position of some enthusiasts of the reformation era and partly to meet the very genuine questions a professional soldier asked him. His treatise, "Whether Soldiers, Too, Can Be Saved," elaborated upon the distinctions he had developed in his political ethics. For example, when he considered the difference between office and person he stated:

In the first place, we must distinguish between an occupation and the man who holds it, between a work and the man who does it. An occupation or a work can be good and right in itself and yet be bad and wrong if the man who does the work is evil or wrong or does not do his work properly.¹⁹

In addition, the widespread social disorder and poverty that accompanied the many sixteenth century changes, particularly the closing of convents and monasteries and the seizure of church property by secular authorities, prompted Luther to advise a community who had requested advice, how it should spend its public funds, including its support of the poor. Despite its title, "Preface to an Ordinance of a Common Chest" had nothing to do with voluntary fund-raising (it has been thus misused in histories of social work), but dealt with the disposition of revenues from former ecclesiastical properties.

Luther was a lifelong advocate of education for the laity; indeed, he was far ahead of his time in insisting upon the education of both sexes. This education of the laity was necessary to develop a cadre of qualified public servants. He saw education for any vocation as requisite preparation for service to the neighbor. Thus, Luther called Christians to public service.

19. 46 LUTHER'S WORKS 94 (R. Schultz ed. 1967).

The above treatises and many other writings indicate that throughout his life Luther was a public man engaged in public affairs. He felt that neither the concerns of the church nor the concerns of daily life fell into the category of the private. In other words, in life together with others Luther expected people to practice *civil righteousness*. While civil righteousness was not the righteousness that saved, nevertheless it was necessary for life together. Both in Luther's theological sense and in more ordinary usage, civil righteousness was the domain in which people came to a clearer understanding of the nature and intent of the divine law in the ordering of human affairs. Thus, Luther insisted:

He is not preaching here [Matt. 7:12, the Golden Rule] about the sublime doctrine of faith in Christ but only about good works. These are two distinctive proclamations, both must be preached, but each at its appropriate time. You can tell plainly from the words in the text where He says, "Whatever you wish that men would do to you, do so to them." By this He indicates that His preaching here does not go beyond the relation that people have with us and we with them, and that it is not talking about the grace of Christ which we receive from God.²⁰

What Law Governs the God-Relationship?

One can only understand Luther's whole approach to Christian life, including life together in the political community, in terms of his seminal alones: faith alone; grace alone; Scripture alone; and Christ alone. The fundamental relationship with which people began was a God-relationship; Luther's use of the "alone" signifies the exclusive character of the God-relationship. Faith was not a quality or disposition of the human being, rather it was the God-relationship, which grace brings into being, to which Scripture testifies, and which one encounters in Christ. In a sense, all four terms, faith alone, grace alone, scripture alone, and Christ alone, were ways to describe the same relationship.²¹

In Luther's exposition of the First Commandment in "Large Catechism," he answered the question, "What is it to have a God?"

20. *The Sermon on the Mount*, in 21 LUTHER'S WORKS 240 (J. Pelikan ed. 1956).

21. The exposition here and in the following paragraphs owes a great deal to Ragnar Bring, *Das Verhältnis von Glauben und Werken in der lutherischen Theologie*, "Forschungen zur Geschichte und Lehre des Protestantismus," (1955) [hereinafter cited as Bring].

A god is that to which we look for all good and in which we find refuge in every time of need. To have a god is nothing else than to trust and believe him with our whole heart. As I have often said, the trust and faith of the heart alone make both God and an idol. If your faith and trust are right, then your God is a true God. On the other hand, if your trust is false and wrong, then you have not the true God. For these two belong together, faith and God. That to which your heart clings and entrusts itself is, I say, really your God.²²

For Luther, to have a God was an expression of total orientation; that is, one's fundamental stance and function in the world. Faith was not one attribute among many others, nor was religion something to do from time to time. If God has taken hold in this fundamental faith-relationship, then all one is and does flows from that relationship. Faith can indeed be seen as a form of action in the world. It is more generally described as love; the acts themselves are good works. Everything belongs together in the unitary faith-relationship. Luther continued in his exposition:

In this faith all works become equal, and one work is like the other; all distinctions between works fall away, whether they be great, small, short, long, many, or few. For the works are acceptable not for their own sake but because of faith, which is always the same and lives and works in each and every work without distinction, however numerous and varied these works always are, just as all the members of the body live, work, and take their name from the head, and without the head no member can live, work, or have a name.²³

Thus, it is not correct to raise the question of the relationship between faith and good works as if these were two separate and independent realities.²⁴ Luther had broken decisively from scholastic theology. His debate with Erasmus in "The Bondage of the Will" made clear that he had also broken free from his humanist contemporaries.

Out of this concept of faith and the God-relationship in which Christians exist, Luther developed the paradox: "A Christian is a

22. M. LUTHER, *THE BOOK OF CONCORD: THE CONFESSIONS OF THE EVANGELICAL LUTHERAN CHURCH* 365 (T. Tappert ed. 1959) [hereinafter cited as *THE BOOK OF CONCORD*].

23. *Treatise on Good Works*, in 44 LUTHER'S WORKS 26 (J. Atkinson ed. 1966).

24. BRING, *supra* note 21, at 39-53.

perfectly free person, subject to none. A Christian is a perfectly dutiful servant of all, subject to all."²⁵

This paradox rests on the conviction that the liberation that Christ brought to humankind was truly a liberation from bondage. Luther felt Christ rescued Christians from the external powers that drove and constrained, that made demands and forced compromises. Thereafter, people belonged to God. Indeed, Luther echoed Paul's words that each individual died and was born again. In this new life, believers live in a God-relationship in which they are empowered to do willingly whatever it is that their neighbors need for survival and meaningful human existence. Christians are servants, indeed, but willing servants, just as lovers are quick to respond to the slightest hint of the loved one's desires and needs. This love is not something different from faith; it is the faith-relationship manifesting itself. Therefore, as Luther constantly argued, unless faith was present, the works would not be good:

If he finds his heart confident that it pleases God, then the work is good, even if it were so small a thing as picking up a straw. If the confidence is not there, or if he has any doubt about it, then the work is not good, even if the work were to raise all the dead and if the man were to give his body to be burned.²⁶

A New Understanding of Law

This understanding of human life led Luther to his new understanding of natural law. Indeed, for Luther, natural law was summed up in a single precept, the golden rule.²⁷ Sometimes Luther summarized this precept in the commandment, "Love your neighbor as yourself." Luther did not see, however, that in its proper sense "love of neighbor" required anything other than the golden rule. In "The Sermon on the Mount," Luther said:

Similarly, you would not want anyone to do you injury or harm, to malign you, or to do anything like that. Then why do you yourself violate the rule and standard that you demand of others and want them to keep? How can you judge, criticize, and condemn someone else if he does not treat you that way? Why do

25. 31 LUTHER'S WORKS 344 (Grimm ed. 1957).

26. *Treatise on Good Works*, in 44 LUTHER'S WORKS 25 (J. Atkinson ed. 1966) (footnote omitted).

27. *The Sermon on the Mount*, in 21 LUTHER'S WORKS 236 (J. Pelikan ed. 1956).

you refuse to obey your own rule? Go through all the commandments of the Second Table this way, and you will find that this is really the summary of all possible sermons, as He Himself says here It takes a good teacher to condense and summarize such a long, drawn-out sermon in such a way that everyone can carry it home with him, be reminded of it daily, and see what is missing in his whole life; for he has it written in his own heart, in fact, in his whole life and activity, as we shall hear in more detail.²⁸

The German protestant canon lawyer, Johannes Heckel, has made the most complete investigation of Luther's understanding of law. In his major work, *Lex Charitatis*,²⁹ Heckel listed five characteristics of Luther's concept of natural law. He stated that Luther understood natural law as an expression of the righteous will of God, as spiritual, and as universal; its context was the golden rule; and it manifested God's love and faithfulness.³⁰ If one substituted God-related for spiritual, one could restore Luther's sense of spiritual. Luther used the word spiritual to denote God-relatedness. Thus, Luther said:

[Y]ou will see that Christ is talking about a spiritual existence and life and that He is addressing Himself to His Christians. He is telling them to live and behave before God and in the world with their heart dependent upon God and uninterested in things like secular rule or government, power or punishment, anger or revenge.³¹

Luther's use of language constituted a crucial departure from the ontological meanings with which these terms had been invested in medieval philosophy. Often, his own colleagues did not fully grasp the radical difference in Luther's use of the old terms.³²

The natural law, as Luther understood it, was necessarily valid for all. He stated:

Now in all this I have been speaking of the common, divine, and natural law which even the heathen, Turks, and Jews have to keep if there is to be any peace or order in the world. Even though you were to keep this whole law, you would do no better and no more than the heathen and the Turks do.³³

28. *Id.*

29. J. HECKEL, *LEX CHARITATIS* (rev. ed. 1973).

30. *Id.* at 68-85.

31. 21 LUTHER'S WORKS 108 (J. Pelikan ed. 1956).

32. Bring makes this point particularly as to Melancthon. BRING, *supra* note 21.

33. *Admonition to Peace, A Reply to the Twelve Articles of the Peasants in Swabia*, in 46 LUTHER'S WORKS 27 (R. Schultz ed. 1967).

For Christians, however, something more was involved: namely, the recognition of mutual interdependence. In his explanation of the first article of the creed in the "Large Catechism," Luther taught that "we learn from this article that none of us has his life of himself, or anything else that has been mentioned here or can be mentioned, nor can he by himself preserve any of them, however small or unimportant."³⁴ Moreover, those who did not stand in the God-relationship could not escape the law. Thus,

there are few true believers, and still fewer who live a Christian life, who do not resist evil and indeed themselves do no evil. For this reason God has provided for them (the non-Christians) a different government beyond the Christian estate and kingdom of God. He has subjected them to the sword so that, even though they would like to, they are unable to practice their wickedness, and if they do practice it they cannot do so without fear or with success and impunity.³⁵

The institutions of society existed as a safeguard for human well-being. To direct humans in this direction was Luther's political, or good, use of the law. As Luther stated, "[t]he laws are indeed the true armor and weapons which maintain and protect land and people, yes, the empire and worldly government itself."³⁶

Thus the question never became whether law was necessary for human existence or whether all humans were under the law. The question rather concerned how humans were related to the law, and the answer was that the relationship arose out of the God-relationship.

The God-relationship was itself paradoxical because Christians were both totally righteous but also persistently sinful beings. Christians would remain in the world and the struggle between good and evil would continue. Within that setting, Christians were called upon to act responsibly out of their God-relationships on behalf of their fellow human beings.

Civil Righteousness

Luther called civil righteousness the righteousness that was proper in the above context. It is important from the outset to stress

34. THE BOOK OF CONCORD, *supra* note 22, at 412.

35. *Temporal Authority: To What Extent It Should Be Obeyed*, 1523, in 45 LUTHER'S WORKS 90 (W. Brandt ed. 1962).

36. *A Sermon on Keeping Children in School*, 1530, in 46 LUTHER'S WORKS 245 (J. Schultz ed. 1967).

that Luther was not actually describing a realm of life separate from Christian life, although theologians have often read his language in that way. Luther argued simply that when people judged the consequences of their behavior in human relationships, considerations of reason, utility, and the common welfare should provide perspectives and criteria for guidance. Christian love, the very love which empowers people through the God-relationship, responds to the necessities of the human situation with the apparently simple query: what course of action would most nearly secure justice for all concerned?

In answer to this query, the law itself, whether conceived of as natural law or as positive law, plays a proper and necessary role. Luther sometimes made the extravagant claim that Christians did not need law or civil government. Ideally, and seen only from the perspective of the God-relationship, this claim would have been true. The facts were, however, that Christians were a small number in any given community and, in addition, they were themselves still caught in the daily web of sin.

Law is therefore essential; but it must not be absolutized. In today's culturally complex world little likelihood exists that any body of laws will rise to ultimate value. Despite the lawlessness of his times, Luther saw that theologically many persons, particularly the most devout, were looking for some ideal pattern of behavior which would be God-pleasing and meritorious. The imitation of Christ in Roman piety, as well as the Old Testament legalism of the reformation radicals, struck Luther as human-centered ways of salvation. They were, therefore, false ways.

Luther's strictures against natural law consisted primarily of his protest against the absolutizing of rules of law. His understanding of natural law, in terms of the golden rule, implied that what humans should do could, in fact, change with differing situations and circumstances. He had little patience with attempts to draw up lists of specific precepts of the natural law, as his younger colleague Melancthon later did.³⁷ Insisting that the governing principle should be equity and the use of reason, Luther stated:

37. In the 1555 edition of *Loci Communes*, Melancthon taught "a third use of the law" for the regulation of Christian life, which included an extensive application of the Ten Commandments. See MELANCHTHON ON CHRISTIAN DOCTRINE 83-129 (C. Manschreck ed. 1965).

[S]ince the government in our German lands is supposed to be guided by the imperial law of Rome, and this law is our government's wisdom and reason, given it by God, it follows that this government cannot be maintained and will inevitably perish unless this law is maintained. Now who will maintain it? Not fist and weapons; heads and books must do it.³⁸

In his overreaction against regulation, Luther sometimes suggested that wise magistrates, princes, or rulers could in fact draw upon their own experience and common sense to determine justice in particular instances.

Luther tended at times to support somewhat inconsistent positions. For example, he argued against rebellious spirits insisting that even a bad set of laws through which a community managed to live in peace was to be preferred to social unrest. More frequently, however, Luther tended to stress the positive functions of law that secured peace, protected lives and property, allowed persons to pursue their vocations, and, not least important, permitted the free preaching of the Gospel. Generally, Luther found the best embodiment of his thoughts in the Roman law. There he found fundamental principles for the ordering of society.

The Order of Society

Three major institutional complexes were central to Luther's ordering of society. More correctly stated, the unity and well-being of society found its best articulation in a threefold order of hierarchies. These three together, each of which Luther saw as God-given, organized life to meet the full needs of all members of the human community. Luther's favorite terms, now technical terms in Lutheran theology, were *politia*, *oeconomia*, and *ecclesia*. Roughly translated, they are the polity, the domestic economy, and the church.

In addition, Luther at times seemed to give the impression that the world, as Christians experienced it, fell into two parts: a spiritual realm and a temporal realm. These two kingdoms, also a technical term in Lutheran theology, were indeed one way to describe

38. *A Sermon on Keeping Children in School, 1530*, in 46 LUTHER'S WORKS 239 (J. Schultz ed. 1967) (footnote omitted).

what the Christian experienced. Luther described the world as an arena for cosmic conflict between good and evil, God and Satan:

For Christians know there are two kingdoms in the world, which are bitterly opposed to each other. In one of them Satan reigns, who is therefore called by Christ "the ruler of this world" (John 12:31) and by Paul "the god of this world" (II Cor. 4:4) In the other Kingdom, Christ reigns, and his Kingdom ceaselessly resists and makes war on the kingdom of Satan.³⁹

Humans must be on one side or the other; there is no neutral ground.

In a similar manner, Luther sometimes described the God-relationship as both inner and outer. In doing so, however, he was not making a psychological distinction, he was simply describing the quality of the God-relationship and its manifestation, faith and love, which were two facets of a unitary relationship.⁴⁰ He described behavior as *coram Deo*, viewed and judged in the light of the God-relationship, and as *coram hominibus*, viewed and judged in the light of human relationship. In these two descriptions there was the distinction between *actual righteousness*, which Christ through grace had won for humankind, and *civil righteousness*, which was the norm and criteria for justice in the human community.

Luther related that, when one looked at the human community, one discovered that God had provided a way of ordering life that would provide for welfare and prosperity: namely, the three major institutional structures. These structures were God's modes of governance (the German word: *Regimente*), his way of assuring that human affairs run their course within limits that make survival possible. God had but a single will for humankind, yet that will was experienced differently depending upon the relationship to God within which humans stood. In the God-relationship those who heard the Gospel found themselves under the governance of His love. Those who had not heard the gospel experienced the word of God as law, external constraint, accusation, and judgment. Even Christians, indeed especially those zealous to please God, may have heard the word of God as an external demand. Thus, the word of God may have bred the anxiety that led egocentric humans to rigid con-

39. *The Bondage of the Will*, in 33 LUTHER'S WORKS 287 (P. Watson ed. 1972).

40. Cf. K. Hertz, *Nordamerikanische Perspektive zur Diskussion über die Zweireichelehre*, in ZWEIREICHE UND REGIMENTE, IDEOLOGIE ODER EVANGELISCHE ORIENTIERUNG? 229-40 (U. Duchrow ed. 1977).

formity with regulations of conduct, a form of piety which appeared and reappeared in Christian history and contradicted the claim of Christian freedom.

Within the human context, an arena for action, the will of God also remained unitary. That will is God's loving care for His creation, a care in which He calls upon humans to be cooperators with Him. Luther thus stated:

Before man is created and is a man, he neither does nor attempts to do anything toward becoming a creature, and after he is created he neither does nor attempts to do anything toward remaining a creature, but both of these things are done by the sole will of the omnipotent power and goodness of God, who creates and preserves us without our help; but he does not work in us without us, because it is for this he has created and preserved us, that he might work in us and *we might cooperate with him, whether outside his Kingdom through his general omnipotence, or inside his Kingdom by the special virtue of his Spirit.*⁴¹

This cooperation may take the form of either the spontaneous response which grows out of love or the grudging conformity of those whom the law must coerce. The difference did not necessarily lie in the action, for love sought justice among humans. The instrument for the implementation of justice was law. God's mode of governance in human institutions was, therefore, law, even in the church, manifesting itself as an institutional reality, a set of relationships among persons directed to attaining certain ends.

Consequently government was an ordinance of God which punished evildoers and protected the good. Indeed, *Romans* 13 could serve as the basic constitution for Luther's understanding of government provided that what later generations have sometimes read into this chapter beyond Luther's own intent is screened out. The starting point for Luther's treatise on "Temporal Authority" was *Romans* 13; he wanted to make clear what the power of the sword included. At the same time, however, he counselled moderation and wisdom:

A prince must punish the wicked in such away that he does not step on the dish while picking up the spoon, and for the sake of one man's head plunge country and people into want and fill the land with widows and orphans He is a mighty poor Christian who for a single castle would put the whole land in jeopardy.⁴²

41. *Bondage of the Will*, in 33 LUTHER'S WORKS 242-43 (P. Watson ed. 1972) (emphasis added).

42. *Temporal Authority: To What Extent It Should Be Obeyed*, 1523, in 45 LUTHER'S WORKS 124 (W. Brandt ed. 1962) (footnote omitted).

Luther's Government

Luther usually spoke of government in personal terms. The modern state did not really exist within his experience, although there were beginnings in both England and France and John of Salisbury had provided a theoretical framework.⁴³ The persistence of feudalism in Germanic territories, however, reinforced Luther's understanding which gave high priority to personal relationships of loyalty and service. Luther, particularly when he dealt with political issues, engaged in lengthy discussions of the proper conduct of the princely office.

One note was dominant. The prince must serve his people; their welfare came first. Whether he levied taxes, ordered the schools, or waged war, his primary consideration must not be his own gain or the defense of his honor. He was to avoid the use of force, particularly making war, as much as possible. Luther felt that "[w]orldly government has not been instituted by God to break the peace and start war, but to maintain peace and to avoid war."⁴⁴ Only in self-defense is war permissible, and even then the ruler must make sure that the injuries and costs of the war do not exceed what his territory would suffer from remaining at peace. Prudence and rational calculation, as well as the use of wise counsellors including legal advisors are of the utmost importance. Luther freely admitted that a Christian prince was "a rare bird;" indeed, even a good ruler was not easily found.

Luther did not really indicate any direct limits on the powers of government, except that they must not intrude into the affairs of the church. Even in this restriction he left a murky area. Clearly, interference with the preaching of the Gospel was forbidden. Indeed, under such circumstances Christians would have had no choice but to resist. This issue of governmental interference with the Gospel actually gave rise to his first systematic treatise, "Temporal Authority: To What Extent It Should Be Obeyed, 1523." The treatise did not actually present a commitment to unquestioning obedience, a

43. See G. POST, *STUDIES IN MEDIEVAL LEGAL THOUGHT, PUBLIC LAW AND THE STATE* 1100-1322 at 514-20 (1964).

44. *Whether Soldiers Can, Too, Be Saved*, in 46 LUTHER'S WORKS 118 (R. Schultz ed. 1987).

position of which Luther has often been accused, as much as an attempt to draw the line between obedience and dissent in the proper place.

In attempting to draw that line, the issue that troubled him continues to be a legal problem today, even where official separation of church and state exists. The *ecclesia* is not only a community of believers, an assembly of Christian people, but it is also an institution with material possessions and material needs. It is an enterprise many of whose actions do not differ substantially from those of other properly secular institutions; it pays wages, buys and sells wares on the open market, elects officers, gives instruction, marries the living, and buries the dead.

If Luther had not so sharply undermined the bishops' privileges and they had rallied to his cause in Germany, much of the necessary reorganization of church affairs in conformity with Luther's ideas might have occurred under the bishops' auspices. In fact, the territorial princes undertook much of this reorganization so that it seemed everything administrative and organizational was indeed external and therefore essentially unrelated to the Gospel. The princes' work resulted in the German system of territorial churches, which even today maintain a close relationship with the political establishment.

In this setting, where religion's communal and associational qualities were intertwined, Luther offered no ironclad rules. Because he saw no absolute and ultimate quality in any law—such a quality would detract from God's exclusive sovereignty over the affairs of humankind—he proceeded pragmatically and flexibly.

Public Institutions

Luther and the Domestic Institution

The domestic economy for Luther covered both marriage and the management of a household and its enterprises. The day of separate and independent business enterprises had not yet arrived in Saxony. Thus, he saw the basic constellation of human relationships, involving not only husbands and wives as well as parents and children, but also servants and apprentices and their masters.

Within the context of this Article it is not necessary to expand upon his treatment of these activities, except to note two important

innovations. First, Luther insisted that marriage was in fact a secular affair, not a sacramental matter. He said, "No one can deny that marriage is an external, worldly matter . . . subject to temporal authority."⁴⁵ He was more than willing to place it under the jurisdiction of the secular government. Moreover, he supported the establishment of a consistory in Saxony to deal with marital questions.

Second, Luther insisted throughout his life that "marriage is a *public* estate which is to be entered into and recognized publicly before the church . . ."⁴⁶ Consequently, whatever went on among the persons within a household was of public concern. The domestic institution was having humans serve one another. The Golden Rule was given structural reality in the institution. In addition, to be the head of a household was to occupy a public office. The head of the household was, therefore, responsible not only for the welfare of the members of the household but also for assuring that the household contributed to the public good.

Luther's insistence upon the public nature of domestic life came in his argument for keeping children in school. He told parents in effect that God had given them the blessing of children so that by means of the family, each generation would be assured of faithful and capable public servants. Luther, in insisting that the family must educate its children, stated:

Now if you have a son who is able to learn, and you are in a position to keep him at it, but do not do so, if you go your way without even asking what is to become of worldly government and law and peace, then you are doing all in your power to oppose worldly authority, like the Turks, indeed, like the devil himself. For you are taking from empire, principality, land, and city, a savior, comforter, cornerstone, helper, and deliverer.⁴⁷

Furthermore, the household was not only a public institution but it also was an economic institution. Luther did not recognize the arguments in favor of private enterprise. A person's occupation, whatever it was, was a means for fulfilling God's love requirement. People were on earth not to aggrandize and enrich themselves, but to serve one another's needs. Without question, Luther would have laid this same requirement upon corporate enterprises. Moreover,

45. *On Marriage Matters*, in 46 LUTHER'S WORKS 265 (R. Schultz ed. 1967).

46. *Id.* at 268 (emphasis added).

47. *A Sermon on Keeping Children in School, 1530*, in 46 LUTHER'S WORKS 242 (R. Schultz ed. 1967).

by his own logic, he would not have shrunk from governmental regulation of economic activity.⁴⁸ It is interesting to note that the predominantly Lutheran countries of Europe, particularly the Scandinavian ones, have moved farther in the direction of a bureaucratic socialism than all the other countries in the West. Behind the ideological rhetoric and despite, in some instances, strong anticlerical motifs and doctrinaire Marxist allegiances, the basic economic thrust of these countries has been toward a welfare state administered by a civil service that for the most part continues to have a high sense of public responsibility. In all of these countries even the most conservative members of the church tend to support the major welfare goals, and they are more concerned with abuses than with abolition.

The Church

To Luther the church, too, was a public institution. Its appointed leaders, including lay persons as well as the clergy, had not only the right, but the obligation to speak out on public issues. Luther's efforts at institutional separation of religious and political institutions were never meant to silence religious criticisms of social evil. He wanted to break the interlocking directorates, that is, the possession by the clergy of a host of political privileges which had no connection with the Gospel. The only power which the church should have wielded was the power of the Word.

No one had the right to silence the proper public preaching of the Gospel. Whenever those in public office, which in terms of Luther's understanding must have included all adults, failed to act responsibly, when they abused their power, neglected their duties, or mismanaged their affairs, the public ministry had a right to call them to account. Christ

entrusts this ministry to us and He wants us to open our mouths vigorously, to denounce what must be denounced, heedless of our own danger, inconvenience, advantage, or pleasure, and of other people's malice and contempt. Our consolation is in the fact that He makes us His salt and will sustain us in our salting. He commands us to do that salting with good cheer, regardless of whether the world refuses to tolerate it and persecutes us.⁴⁹

48. Luther strongly condemned certain practices of his day in *Trade and Usury*, 1524, in 45 LUTHER'S WORKS 2131-310 (W. Brandt ed. 1962). At the same time he relativized the Mosaic code upon which medieval restrictions were based. Cf. B. NELSON, *THE IDEA OF USURY* (2d ed. enl. 1969).

49. *The Sermon on the Mount*, in 21 LUTHER'S WORKS 420 (J. Pelikan ed. 1956).

The only means available to the preacher was the Word, but Luther considered this sufficient. When others challenged Luther to defend this seemingly unrealistic utopianism, he simply pointed to his own career, the spread of the evangelical movement, and his own continued freedom to speak out boldly.

Person and Office

At this juncture, the question arises, did Luther leave no room for private concerns? The correct answer is, probably, very little. The false dualism, however, in which the German theological tradition has often read Luther, has led to some misconceptions. Troeltsch and others have heavily criticized Luther's distinction between person and office. Read literally, without knowledge of the shift in the connotative context, these critics seem right. Thus, when Luther argued that it was not the prince as Christian but as magistrate who made war, killed, and destroyed, he seemed to be bifurcating human life at the hazard of moral schizophrenia. The prince, however, was not two persons. He was the same person seen in two different relationships and, therefore, judged by one of the appropriate criteria. Humans are not to ask for redress for any injury to themselves. To do so is both to act as a judge in their own case and to show themselves unwilling to accept what others do to them; it is to be egocentrically preoccupied. If, however, what is done injures a neighbor, then love springs into action to protect that neighbor.

An example of Luther's distinction between person and office was the judge on the bench who thought that a personal Christian commitment required forgiveness of the accused whom he had just found guilty. Such a judge forgot that love goes far beyond the person-to-person relationship between judge and accused. Love without justice is destructive sentimentalism. Justice requires critical reflection. Love rejects the arguments from both extremes. Too light a sentence out of a misplaced compassion may mean that the judge is not adequately providing the protection that the community requires. Too heavy a sentence, in order to teach the offender a lesson, may simply confirm the criminal's hostility to society and lead to greater injury in the future. Neither punishment in itself, as an absolute, nor rehabilitation, as the contrary absolute, may give love its proper expression, that is, lead to a sentence that best approximates justice for all who have a stake in the outcome.

Punishment, indeed, Luther took for granted. It was the negative version of the Golden Rule, which in his day had found expression in the principle of retaliation, the *Fehderecht*. Luther felt that punishment had to come from the proper authority and it had to be appropriate to the situation:

[A] prince must have the law as firmly in hand as the sword, and determine in his own mind when and where the law is to be applied strictly or with moderation, so that law may prevail at all times and in all cases, and reason may be the highest law and the master of all administration of law.⁵⁰

Today, much more is involved than the relationship between judge and accused, the so-called personal dimension. More also is involved than the possible future behavior of the accused. The entire structure of police, judicial, and correctional institutions falls into the complex of concerns.

In contrast to Luther's statements regarding theological questions, he constantly reiterated the importance of the use of reason in temporal affairs. He would not rely upon momentary impulses of the Spirit and certainly not upon emotional responses. He wanted an educated public administration that was aware of its vocation, diligent in its work, and putting its best intelligence into providing the community with peace and order.

This author will, in addition take this office and person one step further because nowhere have his liberal critics and evangelical disciples so misinterpreted Luther in this regard. Inner or spiritual, the two words which Luther most frequently used when he described how the Christian was to act in that Christian's own behalf, do not describe or denote a psychological attribute. They signify the whole person within the God-relationship. In this relationship, considered in its purity, all thought of self has disappeared. (It was the *incurvatus in se*, the turned-in-upon-one's self quality, that was for Luther the very essence of sin.) The individual's life is in God's hands so that whatever action occurs flows from that relationship. By themselves, Christians may then quite properly accept and suffer injustice, if in fact the suffering is theirs alone. If the ruler confiscates a Christian's property, especially if this confiscation is a sanction

50. *Temporal Authority: To What Extent It Should Be Obeyed*, in 45 LUTHER'S WORKS 119 (W. Brandt ed. 1962).

against the believer's faith, the choice may well be for the believer to accept the suffering.

In contrast, if another is involved, that is, if the welfare of others is in the balance, then the proper course of action may well be to protest or to do whatever else is properly within the Christian's means. A worker may, for example, respond to poor wages by changing jobs, particularly if that worker has a family to support. The worker may also, quite properly, ally with others to form a union, engage in collective bargaining, and even strike. The concern for the welfare of others, other employees, family, even the common good, may suggest the appropriate action.

Civil righteousness as examined above is never without sin. To say this, however, so far as Luther was concerned, is simply to recognize the human condition, that is, the *simul* of the justified and the sinner that every Christian must acknowledge. While the actual determination of the best course of action will in many instances be difficult, for the Christian, the commitment to civil righteousness is simply the way in which love expresses itself *coram hominibus*. Civil righteousness is the persistent human quest for justice. Thus, advocacy of justice is both the responsibility of every Christian as a person with a public calling, and particularly the responsibility of public preaching. It is the way in which the church fulfills its role as a public institution.

The world needs both kinds of righteousness and both kinds of government: "Both must be permitted to remain; the one to produce righteousness, the other to bring about external peace and prevent evil deeds. Neither one is sufficient in the world without the other."⁵¹

In Luther's view all people held public office.⁵² This meant that both individually and corporately all people were accountable for their neighbor's welfare. Furthermore, in Luther's thinking, the callings themselves were good, even when the persons in the office were evil. He quoted a pithy German proverb, "Das Recht ist allzeit ein from Mann, Der Richter ist oft ein Schalk." (Justice is always an honest man, but the judge is often a rogue.)⁵³ More pointedly,

51. *Id.* at 92.

52. G. Scharffenorth, *Auswirkungen von Luthers Kirchenverständnis . . . im 16.ten Jahrhundert*. (unpublished). This Heidelberg study of the church constitutions of the Reformation emphasized the wide array of offices in the church.

53. *Against Hanswurst*, in 41 LUTHER'S WORKS 245 (E. Gritsch ed. 1966).

in his explanation of the seventh commandment in his "Large Catechism," Luther put the responsibility for poverty on those who could help:

But beware how you deal with the poor, of whom there are many now. If when you meet a poor man who must live from hand to mouth, you act as if everyone must live by your favor, you skin and scrape him right down to the bone, and you arrogantly turn him away whom you ought to give aid, he will go away wretched and dejected, and because he can complain to no one else, he will cry to heaven.⁵⁴

One further facet of Luther's understanding of natural law was the notion of reciprocity. One must recognize that he was thinking theologically, not metaphysically, and certainly not scientifically. "Do unto others as you would have them do unto you" implies a correspondence in quality of actions performed. Evil actions will call out evil. Those who do wrong will reap their rewards. Although the mills of God may grind slowly and mysteriously, they continue to grind. Even in the Peasants' Revolt, Luther reminded the princes that they had asked for the troubles they were experiencing. He considered the cries of the oppressed as calls for help. He even saw in the violence of the oppressed, however much he may have considered the actions wrong, ways in which old accounts of injustice were called in for payment.

If natural law was understood as a body of precepts that were eternally grounded and immutable, then Luther had no doctrine of natural law. Indeed, when the Peasants' Revolt and the Anabaptist movements directly raised the question whether the Scriptures should determine the norms for public action, that is, determine the content of secular law, Luther's answer was a resounding "no!" He took particular umbrage at the way in which the peasants in their "Twelve Articles" attempted to use the Gospel to legitimate their cause. To turn the Gospel into law is to misunderstand the God-relationship entirely; it is in fact a return to a religion of works-righteousness.

He was equally adamant against efforts to impose the Mosaic Code on Christians. In translating the commandment, "Remember the Sabbath Day to keep it holy," he deliberately changed the word Sabbath, the seventh day, to *Feiertag*, festival day or holiday. He never, however, illustrated his freedom from a biblical legalism and

54. THE BOOK OF CONCORD, *supra* note 22, at 398.

scriptural rigidity more clearly than in his discussion of the date of Easter. The discussion was in a work written late in his career and occurred in an historical context in which he rejected the applicability of the prohibitions of the Jerusalem Council to the Christians of his day:

We therefore have and must have the power and the freedom to observe Easter when we choose; and even if we made Friday into Sunday, or vice versa, it would still be right, as long as it were done unanimously by the rulers and the Christians (as I said before). Moses is dead and buried by Christ, and days or seasons are not to be lords over Christians, but rather Christians are lords over days and seasons, free to fix them as they will or as seems convenient to them. For Christ made all things free when he abolished Moses. However, we will let things remain as they now are, since no peril, error, sin, or heresy is involved, and we are averse to changing anything needlessly or at our own personal whim, out of consideration for others who observe Easter at the same time as we do. We know we shall attain salvation without Easter and Pentecost, without Friday and Sunday, and we know that we cannot be damned—as St. Paul teaches us—because of Easter, Pentecost, Sunday, or Friday.⁵⁵

Conclusion

Luther was content to let the Roman law bring greater order and peace to Germany. Meanwhile, his own understanding of natural law, the divine law that God had written into the human heart and the law that Christ had expounded in the Sermon on the Mount, gave Luther the flexible instrument with which in every situation he could raise the question of the needs of the neighbor and the service of the common good.

Luther's intuition that educated public servants, indeed an educated Christian people generally, were necessary for the realization of the kind of justice he envisioned was essentially right. Unfortunately, the course of education, even in his beloved and troubled Wittenberg, did not run in the direction of his vision. For Melancthon, the *preceptor Germaniae*, returned to the traditional understanding of the natural law. As the later editions of his pioneer textbook of evangelical theology, the *Loci Communes*, well illustrated, Melancthon found the specific precepts of the natural law in the Decalogue.

55. *Of Councils and the Church*, in 41 LUTHER'S WORKS 67 (E. Gritsch ed. 1966).

Melanchthon, however, despite his undoubtedly sincere efforts to remain faithful to Luther, was too strongly bound to the past. He recast the theological questions in their old forms, forms which Luther had previously broken through. The theological debates that followed Luther's death revealed that both sides, old Lutherans who accused Melanchthon of deviation from Luther and supporters of the gentle Phillip, lined up behind false alternatives. In the process of debate much of what Luther had pioneered was misunderstood, handed down in distorted fashion, or even overlooked. In particular, Luther's radical vision that linked faith and good works together as part of a unitary God-relationship fell apart into the false alternatives of either faith or good works. This false dichotomy nourished the political quietism of many generations of Lutherans. In the same way, the misunderstanding of Luther's distinction between inner and outer nourished the Pietist preoccupation with the psychological dispositions of the believer and reduced public responsibility to works of charity.

Luther made three seminal contributions: first, rejection of the right of retaliation in favor of objective judicial processes; second, the assertion of the institutional independence of secular government from religious oversight and control but not from religious criticism; and third, the vision of a natural law that focused primarily upon the mutual interdependence of all humans.

In effect, international relationships today are still in large part conducted upon the feudal basis of the right of retaliation. Nevertheless, the gradual growth of international institutions may bring law to this anarchic situation. The unity of humankind will not in the foreseeable future be a religious unity. It is possible to envision secular institutions of world government; yet, to be effective, they will require continuing criticism, particularly the kind of criticism that independent religious institutions can bring to bear. Finally, in today's cultural diversity, no immutable set of rights or laws of nature has much chance to prevail. A flexible vision of the human good, however, recognizing the worth of all and the interdependence of all, may provide some necessary guidance. Luther's contributions are valuable for an enlarged consciousness of civil righteousness by means of the rule of law today.